No. 17-368

In the Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

SOLARCITY CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF TENNESSEE, ARIZONA, ARKANSAS, COLORADO, GEORGIA, IDAHO, INDIANA, LOUISIANA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OHIO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici Curiae—the States of Arizona, Arkansas, Colorado, Georgia, Idaho, Indiana, Louisiana, Kansas, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming[1]— have a significant interest in the outcome of this case because they have an interest in preserving their sovereign actions from the threat of unnecessary, costly antitrust litigation. *Amici* rely on various state agencies and other public entities, state and local, to implement economic policy. And this Court has recognized that those actions are immune from federal antitrust laws because States are a "sovereign" part of our Nation's "dual system of government." *Parker v. Brown*, 317 U.S. 341, 351 (1943). That immunity has little value to *Amici*, however, if they must endure the burden and indignity of defending an antitrust suit to final judgment before having the opportunity to appeal from an order denying a claim of immunity.

Amici take no position on the scope of state-action immunity or whether it is applicable on the facts of this particular case. *Amici*'s interest is limited to ensuring that their sovereign right to regulate free from the strictures of federal antitrust law is not threatened by an unduly cramped view of the sovereign interests protected by state-action immunity. *Amici* defend their state entities and officials in antitrust actions, and

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation or submission.

political subdivisions of *Amici* provide such a defense as well. When state-action immunity is wrongly denied by a district court, *Amici* have an interest in correcting that decision—and preserving their immunity—immediately.

SUMMARY OF THE ARGUMENT

The interests threatened by a denial of state-action immunity to a public entity warrant an opportunity for immediate appeal.

1. Deferring appellate review of this class of orders until final judgment compromises the sovereignty interests that animate state-action immunity.

State-action immunity originates in the sovereignty retained by the States in our federal system. And when an interest as valued as state sovereignty would be imperiled by delaying an appeal, this Court has recognized the need for an immediate opportunity to appeal. State-action immunity derives from the same principles of sovereignty as the sovereign immunity recognized in the Eleventh Amendment. A denial of state-action immunity should thus be treated in the same manner as a denial of sovereign immunity: as a threat to the sovereign interests of States. The distinctions on which courts of appeals have relied to justify treating a denial of state-action immunity differently than denials of other immunities are largely immaterial to the central concerns of the collateral order doctrine and, if anything, support an opportunity for immediate appeal.

2. Deferring appellate review of this class of orders until final judgment undermines the federalism principles that state-action immunity was intended to

serve by interfering with States' ability to regulate their economies.

State-action immunity furthers federalism principles by allowing States the freedom to adopt different models and methods for implementing their desired economic policies. But delaying appeals of orders denying state-action immunity until after final judgment will significantly interfere with that regulatory freedom, both by distracting officials from their duties and chilling their discretionary actions. And the uncertainty of the scope of the state-action doctrine exacerbates this effect, leaving States with two undesirable choices: either implement a policy choice with the risk that they will be subjected to burdensome litigation if state-action immunity is denied or forgo their preferred approach altogether.

3. Deferring appellate review of this class of orders until final judgment exposes States and other public entities to unnecessary costs and undermines judicial efficiency.

Antitrust litigation is enormously expensive and consumes significant resources of both litigants and the courts. State-action immunity protects States and state officials and other public entities from these costs. But an inability to appeal immediately from a denial of state-action immunity imposes all of these costs even in cases in which the actions in question are, in fact, sovereign state actions. Permitting an immediate appeal in this narrow class of cases would avoid these unnecessary costs and preserve States' limited fiscal resources. And doing so would enhance—not undermine—the judicial efficiency that the general requirement of finality serves to protect.

ARGUMENT

To be "final" under the collateral order doctrine, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (restating *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

This brief focuses on the third element as applied in the context of this case: whether denial of a public entity's claim to state-action antitrust immunity is "effectively unreviewable" absent interlocutory appeal within the meaning of *Cohen*.

This third *Cohen* element, of course, is not satisfied just because there is a value in winning before trial, rather than after it. That is true for almost all defenses and defendants. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872-73 (1994). "[W]hen asking whether an order is 'effectively' unreviewable" absent interlocutory review, it is "not mere avoidance of trial, but avoidance of a trial that would imperil a substantial public interest, that counts." *Will v. Hallock*, 546 U.S. 345, 353 (2006). The "decisive consideration" under *Cohen*'s third prong is thus whether an inability to seek immediate appellate review will "'imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (quoting *Will*, 546 U.S. at 352-53).

As explained below, deferring appellate review of denials of state-action immunity to public entities would do just that.[2]

I. Deferring Appellate Review of Denials of State-Action Immunity Imperils States' Sovereign Interests

State-action antitrust immunity derives from state sovereignty. It "exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition." *North Carolina St. Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101, 1110 (2015) ("*North Carolina Dental*"). As this Court adopted a more expansive view of the federal government's authority to regulate commerce, *see Wickard v. Filburn*, 317 U.S. 111, 125 (1942), it became apparent that this broader view of federal power could transform existing antitrust laws into a weapon to be used against States' sovereign acts of economic regulation, *see North Carolina Dental*, 135 S. Ct. at 1118 (Alito, J., dissenting); Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Va. L. Rev. 1387, 1394

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[2] The question this Court granted certiorari to review is limited to orders denying state-action immunity to public entities. Pet. i. *Amici* demonstrate why an incorrect denial of state-action immunity to public entities and public officials imperils important public interests and satisfies the final element of *Cohen* appealability. *See* Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 2.04[B], at 2-52 (4th ed. & 2015 Supp.) ("*Fundamentals of Antitrust Law*") ("The importance of *Parker*'s status as an immunity is particularly strong when the defendant is a government agency, subdivision, or government official carrying out duties."). *Amici* take no position on whether a denial of state-action immunity to a private entity satisfies *Cohen*'s final element.

(2016). At the first opportunity, however, this Court rejected that possibility and acted to preserve States' sovereignty. *See Parker v. Brown*, 317 U.S. 341, 351 (1943).

State action undertaken pursuant to the State's sovereign authority is thus immune from the operation of federal antitrust laws. *North Carolina Dental*, 135 S. Ct. at 1110. And a wrongful denial of that immunity subjects States and other public entities to the indignity of defending sovereign action through protracted litigation. This Court has already recognized that such an affront to sovereignty impinges on a "value of a high order" that warrants immediate appeal under the collateral order doctrine. *Will*, 546 U.S. at 352; *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-46 (1993).

A. The purpose of state-action immunity is to protect the States' sovereign interests.

In *Parker*, this Court recognized that subjecting state action to antitrust suit would be an affront to the federalism and dual sovereignty embedded in the Constitution. *See North Carolina Dental*, 135 S. Ct. at 1110. And it refused to hold that Congress had acted to interfere with state sovereignty in that way without an express indication it had intended to do so. *Parker*, 317 U.S. at 350-52. The Ninth Circuit focused myopically on this statutory reasoning in *Parker* to characterize state-action immunity as a doctrine not concerned with sovereignty. Pet. App. 6a-7a, 9a. But that approach overlooks the premise on which the statutory reasoning rested: State sovereignty is an integral part of the Constitutional structure. *See*

Parker, 317 U.S. at 351 ("[U]nder the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority[.]"); *North Carolina Dental*, 135 S. Ct. at 1110 ("[*Parker*] recognized Congress' purpose to respect the federal balance and to 'embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.'" (quoting *Community Commc'ns Co. v. Boulder*, 455 U.S. 40, 53 (1982))).

This Court's decisions on state-action immunity since *Parker*, including its most recent pronouncements, have reiterated the doctrine's grounding in the state sovereignty protected by the federal structure of our Constitution. In early cases, the Court recognized that state-action immunity "preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws," *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion), and is "grounded in our federal structure," *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980). A decade later, in *F.T.C. v. Ticor Title Insurance Co.*, the Court noted that state-action immunity was "adopted to foster and preserve the federal system," safeguards "freedom of action for the States," and "is conferred out of respect for ongoing regulation by the State." 504 U.S. 621, 633 (1992). And most recently, the Court has reiterated that state-action immunity is "premised on an understanding that respect for the States' coordinate role in government counsels against reading the federal antitrust laws to

restrict the States' sovereign capacity to regulate their economies and provide services to their citizens," *F.T.C. v. Phoebe Putney Health Sys.*, 568 U.S. 216, 236 (2013), and "exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition," *North Carolina Dental*, 135 S. Ct. at 1110.

State-action immunity thus preserves a fundamental aspect of our country enshrined in the Constitution: the right of a State to regulate as a sovereign. "States are sovereign, and California's sovereignty provided the foundation for the decision in *Parker*." *North Carolina Dental*, 135 S. Ct. at 1122 (Alito, J., dissenting) (internal citation omitted). The Ninth Circuit's cursory discussion of state-action immunity as a matter of statutory interpretation ignores these background principles.

B. Protecting States' sovereignty is a "value of a high order" that warrants immediate appeal.

The "decisive consideration" in whether an order should be immediately appealable is "whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus.*, 558 U.S. at 107 (quoting *Will*, 546 U.S. at 352-53). A denial of state-action immunity is a denial of the sovereignty of state action. In denying state-action immunity, a court necessarily determines that the "actions in question" are not "an exercise of the State's sovereign power." *North Carolina Dental*, 135 S. Ct. at 1110. State sovereignty is a "value of a high order" that would be imperiled by delaying appellate review.

Indeed, this Court has already concluded as much. One of the "particular value[s] of a high order [that has been successfully] marshaled in support of the interest in avoiding trial" is "respecting a State's dignitary interests." *Will*, 546 U.S. at 352; *see also Puerto Rico Aqueduct*, 506 U.S. at 144-47. This Court's decision in *Puerto Rico Aqueduct* reflects a "judgment about the value" of state sovereignty, namely that it is "weightier than the societal interests advanced by the ordinary operation of the final judgment principles." *Digital Equip.*, 511 U.S. at 878-79.

The Ninth Circuit focused its inquiry on whether state-action immunity is an immunity from suit or an immunity from liability. Pet. App. 8a. But, as Petitioner explains, that distinction dates to an earlier era of this Court's collateral order jurisprudence. Pet. Br. 28-30. More recently, this Court has repeatedly admonished that such classifications are no more than conclusory labels about whether the right asserted meets the third prong of *Cohen*. *See Will*, 546 U.S. at 351-52; *Digital Equip.*, 511 U.S. at 871-72. Instead, after "comb[ing] for some further characteristic that merits appealability under *Cohen*," this Court in *Will* confirmed that the inquiry "boils down to 'a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.'" *Id.* at 351-52 (quoting *Digital Equip.*, 511 U.S. at 878-79); *see also Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 502-03 (1989) (Scalia, J., concurring). That judgment—weighing the interest that would be imperiled by deferring an appeal against the costs of allowing immediate appeal of the category of relevant orders—is the "crucial question" in whether

a category of orders warrants immediate appeal. *Mohawk Indus.*, 558 U.S. at 108.

The Ninth Circuit never made the judgment necessary to answer this "crucial question." Rather than grappling with the interests underlying state-action immunity that might be imperiled, the court relied on conclusory labels. In so doing, the court characterized state-action immunity in a manner contrary to this Court's recent descriptions. The Ninth Circuit concluded that state-action immunity is *not* "a safeguard of state sovereign immunity," because, in part, "[t]he Supreme Court assumed in *Parker* that Congress could have blocked the challenged . . . regulation." Pet. App. 9a. But this Court has recently said just the opposite: State-action immunity "exists to avoid conflicts between state sovereignty" and federal antitrust laws because "[i]f every duly enacted state law or policy were required to conform to the mandates of the Sherman Act . . . federal antitrust law would impose an impermissible burden on the States' power to regulate." *North Carolina Dental*, 135 S. Ct. at 1109-10; *supra* Part I.A. The Ninth Circuit never considered that sovereignty in its analysis.

The state sovereignty protected by state-action immunity is thus the interest that must be weighed in considering whether to allow an immediate appeal. That calculus is an easy one. State sovereignty is "weightier than the societal interests advanced by the ordinary operation of final judgment principles." *Digital Equip.*, 511 U.S. at 878-79. This Court has repeatedly held in high esteem the sovereignty and dignity the States retain under our Constitution, *see, e.g.*, *Bond v. United States*, 564 U.S. 211, 220-22 (2011);

South Carolina v. North Carolina, 558 U.S. 256, 267 (2010); *Alden v. Maine*, 527 U.S. 706, 713-14 (1999), and a refusal to recognize sovereign action as immune from the operation of the Sherman Act is an affront to that sovereignty, *see North Carolina Dental*, 135 S. Ct. at 1110. Even aside from the disruption to a State's regulatory choices that delaying an appeal will create, *see infra* Part II, the "ultimate justification" for allowing an immediate appeal is the "importance of ensuring that the States' dignitary interests can be fully vindicated," *Puerto Rico Aqueduct*, 506 U.S. at 146. State-action immunity is not primarily concerned with protecting States and their delegates from liability or from injunctive relief; it is concerned with preserving States' "privilege" to regulate their economies without interference from federal antitrust laws. *Id.* at 146-47 n.5.

Delaying an immediate appeal from a denial of state-action immunity until after final judgment imperils that privilege. It permits, and exacerbates, the "conflicts" between State sovereignty and the antitrust laws that state-action immunity is designed to avoid. *North Carolina Dental*, 135 S. Ct. at 1110. And the costs of allowing immediate appeals for this category of orders are minimal. State-action immunity applies only in a narrow subset of antitrust cases involving state-directed, anticompetitive actions. *Cf. North Carolina Dental*, 135 S. Ct. at 1110-11. Providing an opportunity for immediate appeal in this limited class of cases thus prevents fundamental harm to a State's sovereign interests while causing minimal damage to the traditional rule of finality.

C. State-action immunity and state sovereign immunity derive from the same principles and should be treated the same under the collateral order doctrine.

State-action immunity and state sovereign immunity derive from the same background principle of state sovereignty. Although the two immunities differ in many respects, those differences do not relate to the "decisive consideration" and "crucial question" of the collateral order doctrine—whether permitting immediate appeal for these categories of orders is warranted by the potential peril to the important interests they protect. *Mohawk Indus.*, 558 U.S. at 107-08. The interest imperiled is the same. Both doctrines protect States not only from *actual* liability for sovereign action but also from the interference with that sovereign action created by the *potential* to be haled into court. *See Fundamentals of Antitrust Law* § 2.04[B], at 2-51 ("The *Parker* doctrine is designed to be an immunity, not merely a defense that can be offered at trial.").

In *Puerto Rico Aqueduct*, this Court held that a denial of state sovereign immunity warranted immediate appeal because of "the importance of ensuring that the States' dignitary interests can be fully vindicated." 506 U.S. at 146. The Eleventh Amendment is, of course, not the original source of States' immunity from suit. *Alden*, 527 U.S. at 713. Instead, "the Constitution's structure, its history, and the authoritative interpretations by this Court make clear [that] the States' immunity from suit is a fundamental aspect of the sovereignty which the States

enjoyed before the ratification of the Constitution, and which they retain today." *Id.*

Recognizing that state sovereign immunity is in fact "rooted in a recognition that the States . . . maintain certain attributes of sovereignty," and that it "thus accords the States the respect owed them as members of the federation," this Court determined in *Puerto Rico Aqueduct* that a denial of that immunity warranted immediate appeal. 506 U.S. at 146. State-action immunity is similarly "rooted in a recognition that States . . . maintain certain attributes of sovereignty" and accords States "the respect owed them as members of the federation." *Id.*; *see supra* Part I.A.; *North Carolina Dental*, 135 S. Ct. at 1109-10. State-action immunity preserves "the dignity and essential attributes" that "inhere[]" in sovereign States that retain "primary sovereignty" in some areas and share "concurrent authority" in others. *Alden*, 527 U.S. at 714. Absent an express act of Congress pursuant to its constitutional authority either to abrogate state sovereign immunity or to interfere with States' economic regulation, state sovereigns and their anticompetitive actions are not subject to judicial inquiry; they retain their immunity.

The fact that the Eleventh Amendment is an explicit constitutional provision depriving federal courts of jurisdiction over States does not alter that conclusion. The Eleventh Amendment simply "restore[d] the original constitutional design." *Alden*, 527 U.S. at 722. *Parker* is best read to do the same: to restore the constitutional presumption of state sovereignty with respect to matters of state economic regulation after the expansion of federal authority

threatened it. As Justice Alito explained in setting forth the history of state-action immunity, "[f]or the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority." *North Carolina Dental*, 135 S. Ct. at 1119 (Alito, J., dissenting). Accordingly, "the *Parker* Court refused to assume that the Act was meant to have such an effect." *Id.*

Congress may abrogate state sovereign immunity in some instances pursuant to its constitutional authority, *see Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 35 (2012) (plurality opinion), and, although the limits are unclear, Congress may also override State economic regulation pursuant to, among other things, its constitutional authority to regulate interstate commerce. But where Congress has *not* done so, States retain the essential attributes of sovereignty, including an immunity from suit by private parties and an immunity from federal interference with economic regulation of private parties. The affront to that sovereignty led this Court to conclude that state sovereign immunity is a "value of a high order" that must be immediately appealable, *Will*, 546 U.S. at 352, and the same injury occurs when state-action immunity has been denied.

Permitting immediate appeals from a denial of state sovereign immunity but not from a denial of state-action immunity would thus be inconsistent with principles of the collateral order doctrine. Both derive from the reservation of sovereignty embodied in the Constitution, and both protect States' sovereignty from

the indignity of having to wait until after final judgment to be vindicated.

D. The differences between state-action immunity and other immunities support, rather than undermine, the need for immediate appeal.

Relying on the Fourth Circuit's decision in *South Carolina Board of Dentistry v. F.T.C.*, 455 F.3d 436 (2006), the Ninth Circuit cited "three specific incongruities between the state-action doctrine" and other immunities that, if denied, are subject to immediate appeal, including state sovereign immunity. Pet. App. 14a. But like the Fourth Circuit, the Ninth Circuit simply enumerated these distinctions without explaining how they relate to the "decisive consideration" of the collateral order doctrine—the interest imperiled by deferring appellate review. *Mohawk Indus.*, 558 U.S. at 107. In fact, the differences cited by the courts of appeals are either nonexistent or have no bearing on the requirements of the collateral order doctrine. *See* Pet. Br. 42-43. And an examination of these "incongruities" within the framework of the collateral order doctrine reveals that, if anything, they cut in favor of allowing an immediate appeal.

The courts of appeals first noted that municipalities are not protected by the Eleventh Amendment but may benefit from state-action immunity. Pet. App. 15a. But state-action immunity, like state sovereign immunity, recognizes that municipalities "are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985). As a result, a municipality can only benefit from state-action

immunity when it can show the actions in question are *sovereign* actions. *Id.* at 38-39.

The fact that state sovereign immunity corresponds to particular sovereign *entities* and state-action immunity corresponds to particular sovereign *actions* has no bearing on the collateral order doctrine. This "incongruity" reveals the true incongruity of allowing immediate appeals from denials of state sovereign immunity but not denials of state-action immunity. Municipalities are not entitled to sovereign immunity because they are not sovereign; neither are their actions protected by state-action immunity when they are not sovereign actions. But when municipalities' actions *are* sovereign, those actions deserve the same dignity as that afforded to sovereign entities under the federal constitutional framework and Eleventh Amendment. Both are founded on the common principle that the particular immunity should correspond to sovereignty. The right to an immediate appeal should follow that same principle.

The Ninth Circuit also noted that state-action immunity applies to "all antitrust actions, regardless of the relief sought," whereas state sovereign immunity does not bar suits for certain types of prospective relief. Pet. App. 15a (internal quotation marks omitted). But state sovereign immunity *does* bar claims for prospective injunctive relief against States and state entities. *See Cory v. White*, 457 U.S. 85, 91 (1982). It does not bar prospective injunctive relief against state *officials*, *see Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996), because they are not sovereign entities. The fact that state-action immunity could thus be characterized as *broader* and *more* protective than

state sovereign immunity in its effect only demonstrates its importance and the necessity of preserving all sovereign state actions from the operation of the antitrust laws. State officials acting pursuant to official state policy may be sued for prospective equitable relief under the antitrust laws and have no recourse for immediate appeal if state-action immunity is unjustly denied. The breadth of state-action immunity thus supports, rather than undermines, the case for the opportunity to appeal immediately and protect the State's sovereign interests.

Similarly, the fact that state sovereign immunity may not be invoked in an antitrust suit brought by the United States, Pet. App. 15a; *see United States v. Mississippi*, 380 U.S. 128, 140-41 (1965), reinforces the need to ensure proper application of state-action immunity at the outset of litigation in which sovereign actions are in question. Indeed, the Ninth Circuit cited the Eleventh Amendment as a potential alternati "avenue[] for immediate review" where sovereign interests are threatened, Pet. App. 13a n.5, but failed to recognize that the unavailability of that avenue when the United States brings an action makes an opportunity for immediate appeal vital. Immediate appeal from a denial of state-action immunity in these circumstances may be the *only* means of protecting a State's sovereign interests against federal overreach.

Relying on these "incongruities" without examining them in light of the collateral order doctrine, the Ninth and Fourth Circuits overlooked entirely the fact that state-action immunity and state sovereign immunity derive from the same background understanding of

state sovereignty. Given that common background, the two immunities should be treated alike for purposes of the collateral order doctrine.

The Fourth Circuit misses the forest for the trees in concluding that state-action immunity does not "protect against any harm other than a misrepresentation of federal antitrust laws" because it is a limitation on the reach of a statute (the Sherman Act). *South Carolina State Bd. of Dentistry*, 455 F.3d at 444. That reasoning cannot be correct. For example, this Court has previously accepted an appeal under the collateral-order doctrine to decide whether a federal statute contained a sufficiently clear statement abrogating state sovereign immunity. *Seminole Tribe*, 517 U.S. at 52-53, 55-56.

On the Fourth Circuit's simplistic view of *Cohen*, because that clear-statement canon limits the reach of a federal statute, it does not protect against any harm capable of supporting interlocutory appeal. *Contra id.* at 55-56. In reality, the clear-statement rule for abrogation of state sovereign immunity serves important public interests. It gives effect to constitutional separation-of-powers principles, against which Congress is presumed to legislate. Indeed, this Court has held that the clear-statement canon is "[c]losely related" to the clear-statement principle applied in *Parker*: the principle that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (internal quotation marks omitted); *see Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th

Cir. 1996) (quoting that same clear-statement principle as expressed in *Parker*, 317 U.S. at 350-51). As this Court's decisions in *Seminole Tribe* and *Bond* show, interpreting a federal statute in a way that preserves state sovereignty is a principle that protects a substantial public interest.

The rhetorical debate about whether state-action immunity is an "immunity" or a doctrine about the "reach of the Sherman Act" is thus immaterial. *Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc). Nor is attaching a conclusory label such as "immunity from liability" or citing past dicta to that effect dispositive. Pet. App. 9a. Indeed, in *Osborn v. Haley* this Court cited an express statutory purpose to create an "immunity from liability" as evidence of congressional intent to create an immunity from *suit*. *See* 549 U.S. 225, 238 (2007) (citing Westfall Act, Pub. L. No. 100-694, § 2(a)(5), 102 Stat. 4563, 4563 (1988)).

The "decisive consideration" for the collateral order doctrine is the *interest* that will be imperiled by deferring appeal and the "crucial question" is whether the potential harm to that interest outweighs the costs of allowing an immediate appeal. *Mohawk Indus.*, 558 U.S. at 107-08. As to an immunity's origin, moreover, this Court's appealability precedents require only a "good pedigree in public law"—not that the immunity be "explicitly guaranteed by a particular constitutional or statutory provision." *Digital Equip*, 511 U.S. at 875 (quotation marks, ellipsis, and alteration omitted).

State-action antitrust immunity under *Parker* easily meets that test. The interest at issue here—the sovereignty retained by the States at the founding—is

a "value of a high order" and animates both state sovereign immunity and state-action immunity. Deferring appellate review of the latter until after final judgment thwarts the rationale for state-action immunity entirely, just as it would for state sovereign immunity. And state-action immunity has a firm footing in public law, resting on "basic principles of federalism embodied in the Constitution." *Bond*, 134 S. Ct. at 2090. The Court's decision in *Parker* was a direct response to the threat posed to state sovereignty by the federal government's expanding powers under the Commerce Clause.

II. Deferring Appellate Review of Denials of State-Action Immunity Impinges on States' Sovereign Power to Engage in Economic Regulation

A. State-action immunity furthers federalism principles by preserving States' sovereign authority to regulate their economies.

This Court's decision in *Parker* to "confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity" is firmly rooted in federalism principles. *North Carolina Dental*, 135 S. Ct. at 1110; *see also Ticor*, 504 U.S. at 633 ("The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine[.]"); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985) ("The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their

domestic commerce."); *supra* Parts I.A., I.C. Affording immunity to States and their delegates "preserves to the States their freedom under our dual system of federalism" to "administer state regulatory policies free of the inhibitions of the federal antitrust laws." *Lafayette*, 435 U.S. at 415 (plurality opinion).

State-action immunity necessarily contemplates that, in exercising their sovereign authority to regulate their economies, States will do so in ways that are both consistent and inconsistent with federal antitrust laws. *See North Carolina Dental*, 135 S. Ct. at 1109. When States choose to "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives," principles of federalism require that the national policy favoring free competition yield to the States' policy interests. *Id; see also* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335, 347 (2004) (the purpose of state-action immunity is "not to protect federal regulatory or competition goals, but to give appropriate recognition to state regulatory power"). Otherwise, "the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978); *see also North Carolina Dental*, 135 S. Ct. at 1109-10 ("If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate.").

Moreover, this Court's decisions extending state-action immunity to municipalities and other entities to whom States have delegated their regulatory authority correctly recognize that States achieve their policy interests through a wide array of regulatory structures. *See, e.g.*, *Phoebe Putney*, 568 U.S. at 224-25 ("Following *Parker*, we have held that under certain circumstances, immunity from the federal antitrust laws may extend to nonstate actors carrying out the State's regulatory program." (citing *Patrick v. Burget*, 486 U.S. 94, 99-100 (1988), and *Southern Motor Carriers*, 471 U.S. at 56-57)). States sometimes regulate industries and professions directly. *See, e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-63 (1977) (affording state-action immunity to Arizona Supreme Court in action challenging rules adopted by the court to regulate attorneys). Other times, however, States delegate their regulatory authority to state agencies, *see, e.g.*, *Deak-Perera Hawaii, Inc. v. Dep't of Transp.*, 745 F.2d 1281, 1282-83 (9th Cir. 1984) (affording state-action immunity to Hawaii's Department of Transportation); political subdivisions, *see, e.g.*, *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370-74 (1991) (affording state-action immunity to a municipality); and even private entities, *see, e.g.*, *Southern Motor Carriers*, 471 U.S. at 65 (affording state-action immunity to motor common carriers). The States' diverse regulatory approaches are unsurprising given the diverse industries and professions the States regulate. *See* Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 Cal. L. Rev. 1567, 1569 n.4 (2017) (the average state has thirty-nine occupational licensing boards); Hovenkamp, *supra*, at 346 (noting that "States and local governments regulate residential rents, liquor

pricing, intrastate trucking rates, insurance, and taxi fares," among other industries).

In short, state-action immunity was intended to further principles of federalism by ensuring States' "freedom of action," *Ticor*, 504 U.S. at 633, and the availability of a "range of regulatory alternatives," *Southern Motor Carriers*, 471 U.S. at 61, when they exercise their sovereign authority to regulate their economies.

B. Delaying appellate review of orders denying state-action immunity to public entities would undermine federalism principles.

If Sherman Act defendants are precluded from immediately appealing orders denying state-action immunity to public entities, the very federalism principles that state-action immunity is intended to further will be directly undermined.

Much like the doctrine of qualified immunity, state-action immunity accomplishes its aim of giving States and their delegates "freedom of action" and regulatory flexibility by liberating them from the fear that their actions will lead to burdensome and costly litigation. *See Lafayette*, 435 U.S. at 415 (plurality opinion) (state-action immunity "preserves to the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws"). In *Mitchell v. Forsyth*, this Court explained that the doctrine of qualified immunity is animated by the principle that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served

by action taken 'with independence and without fear of consequences." 472 U.S. 511, 525 (1985) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)).

The "consequences" with which the Court was concerned included not only liability for money damages, but also "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816). As the Eleventh Circuit has explained, "[a]bsent state immunity[,] local officials will avoid decisions involving antitrust laws which would expose such officials to costly litigation and conclusory allegations." *Commuter Transp. Sys. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1289 (11th Cir. 1986); *see also We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3d Cir. 1999) (noting that the burdens of antitrust litigation might deter public officials from "vigorous execution of their office" (quoting *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) (Posner, J.))).

The only way to free States and their delegates from the chilling effect caused by the threat of burdensome antitrust litigation is to ensure that questions of state-action immunity are conclusively litigated at the earliest possible stage of the litigation. Otherwise, there is no guarantee that state and public entities and officials who engage in actions entitled to state-action immunity under this Court's precedents will not be subjected to protracted and costly litigation under federal antitrust law, distracting them from their duties and thereby interfering with the State's ability

to effectively implement its regulatory policies. And the mere risk of such litigation will inhibit States from fully exercising their regulatory discretion, in contravention of the federalism principles underlying state-action immunity. *See Fundamentals of Antitrust Law* § 2.04[B], at 2-52 (emphasizing "[t]he importance of *Parker*'s status as an immunity" because of the possibility that public entities and officials could be "intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they might ultimately win").

The need for immediate review of orders denying state-action immunity to public entities is especially strong given the legal uncertainty that exists regarding the precise contours of state-action immunity. *Cf. Jones v. Johnson*, 26 F.3d 727, 727 (7th Cir. 1994) (per curiam) (noting that immediate appeal of immunity issues allows officials to "seek protection from legal uncertainty"). Despite its importance to state sovereignty and federalism, the doctrine of state-action immunity "has continued to spawn more confusion and litigation than certainty." *See* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 674 (1991).

As but one example, in the wake of this Court's decision in *North Carolina Dental*, the States must predict how lower courts will make the legal determinations whether an entity is a "nonsovereign actor whose conduct does not automatically qualify as that of the sovereign State" and whether "active market participants" constitute a "controlling number" of its membership. 135 S. Ct. at 1111, 1114; *see id.* at 1123 (Alito, J., dissenting) (observing that the test

adopted by the majority "raises many questions," the answers to which "are not obvious"); Allensworth, *Foxes at the Henhouse*, *supra*, at 1590 (noting that States wishing to "reconsider their board composition to avoid antitrust liability" must attempt to "predict[] how the courts will interpret *North Carolina Dental*'s language"). And as for *North Carolina Dental*'s requirement that state occupational licensing boards controlled by "active market participants" be subject to "active supervision" by the State, 135 S. Ct. at 1113, this Court acknowledged that it had "identified only a few constant requirements of active supervision" and that "the adequacy of supervision otherwise will depend on all the circumstances of a case," *id.* at 1116-17.

Given these and other unsettled legal questions, States attempting to exercise their sovereign authority to regulate their economies often find themselves unable to predict with any certainty whether a given regulatory structure will be entitled to state-action immunity. This uncertainty and the concomitant threat of antitrust liability hinder States from effectively carrying out their regulatory policies and deter "able citizens" from participating in their regulatory efforts. *Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984). These problems will only be exacerbated if the public entities and individuals sued as a result of the State's actions are unable to immediately appeal an order denying them state-action immunity.

Allowing immediate appeals from an orders denying state-action immunity to public entities, by contrast, will ensure that State officials and other entities and individuals the State has enlisted to implement its

economic policy are able to carry out their duties without fear of being subjected to costly and protracted litigation. This, in turn, will ensure that States retain "their freedom under our dual system of federalism" to "administer state regulatory policies free of the inhibitions of the federal antitrust laws." *Lafayette*, 435 U.S. at 415 (plurality opinion).

III. Deferring Appellate Review of Denials of State-Action Immunity Would Be Inefficient and Would Needlessly Increase Costs for States and the Judiciary

The costs of deferring appellate review of a denial of state-action immunity are various and significant. The significance of those costs also militates in favor of allowing an immediate appeal from an order denying a public entity's claim of state-action immunity.

First, like qualified immunity, state-action immunity protects against the untoward disruption of governmental functions and permits government policymakers to exercise their regulatory discretion unchilled by the threat of litigation. *See Mitchell*, 472 U.S. at 525-26; *supra* Part II. It comes at a high cost to this substantial public interest when the public entity is made to litigate to final judgment before it can appeal an erroneous denial of state-action immunity. Without an immediate appeal, the intended protection evaporates and the threat of litigation will have a chilling effect on government policymakers.

Second, the financial costs and the burdens of defense in antitrust litigation are extraordinarily high. To mitigate those costs and burdens—which are ultimately borne by the citizens—States and their

political subdivisions have an important interest in dismissal of antitrust claims at the earliest stage possible whenever dismissal is legally appropriate. "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

Third, antitrust litigation is costly not just for litigants but also for courts; it can easily consume a vast amount of judicial time and judicial resources. Immediate appellate review of a denial of a claim of state-action immunity to a public entity is, therefore, efficient; it can prevent the waste of judicial resources expended in a trial that, at the end, proves to have been unwarranted. Thus, courts themselves have a vested interest in the early-stage dismissal of antitrust claims that cannot lead to redress.

An appeal from a final judgment cannot adequately safeguard these important state and judicial interests or adequately protect against financial burdens needlessly imposed by forcing a public entity entitled to state-action immunity to engage in the full litigation process. *See Commuter Transp. Sys.*, 801 F.2d at 1289 ("The purpose of the state action doctrine is to avoid needless waste of public time and money."). On the other hand, allowing an immediate appeal to avoid an unnecessary trial when a State or public entity is in fact immune will protect significant public interests, obviate, or at least lessen, unnecessary financial expenditure, foster efficiency, and conserve judicial resources.

It is widely recognized that antitrust litigation is especially and prohibitively costly. Indeed, this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), is predicated in good measure on the fact that antitrust litigation is notoriously expensive. The complex and protracted discovery inherent in the early stages of antitrust litigation accounts for much of that expense. *Id.* at 558 (citing *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.")). *Twombly* thus admonished courts not "to forget that proceeding to antitrust discovery can be expensive." *Id.* at 558-59 (citing, *inter alia*, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1898-99 (2003) (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); and Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed)).

Twombly stands for the general proposition that, when allegations in a complaint, however true, cannot raise a claim of entitlement to relief, the claim should be dealt with "at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (quoting 5 C. Wright & A.

Miller, Federal Practice and Procedure § 1216, at 233-234 (3d ed. 2004)). The point of minimum expenditure in an antitrust case, in particular, comes before the case proceeds to discovery. *Twombly*, 550 U.S. at 558 (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.")).

If a state defendant in an antitrust case is entitled to state-action immunity—whether that immunity is viewed as immunity from suit or immunity from liability—there is no reasonable likelihood that the plaintiff can raise a claim of entitlement to relief or recovery. There is thus every reason to allow the state-action immunity issue to be appealed before the parties and the court are faced with the exorbitant costs of discovery and trial—i.e., to deal with the issue "at the point of minimum expenditure of time and money by the parties and the court."

If anything, antitrust litigation has become even more costly and more burdensome today due to the exponential increase in electronic and paper records and the ubiquity of full-blown electronic discovery. *See SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F. 3d 412, 445 (4th Cir. 2015) (Wilkinson, J., concurring in part and dissenting in part). And, because the high cost of antitrust litigation largely falls on the defendants, it "can have an extortionate effect, compelling some defendants to enter early settlement even in meritless suits." *Id.* at 434 (majority opinion). This Court has

likewise called attention to the *in terrorem* clout of the high cost of antitrust litigation which can drive "cost-conscious defendants to settle even anemic cases" before discovery. *Twombly*, 550 U.S. at 559. States and their subdivisions have, of course, a special duty to their citizens to be cost conscious.

In short, antitrust litigation is especially and increasingly expensive because it is legally and factually complex, inevitably requires massive discovery, cannot be conducted without a battery of highly compensated expert witnesses, and, concomitantly is of protracted duration. *See, e.g.*, *Corr Wireless Commc'ns, L.L.C. v. AT&T, Inc.* 893 F. Supp. 2d 789, 809-10 (N.D. Miss. 2012); *Nespresso USA, Inc. v. Ethical Coffee Co. SA*, 263 F. Supp. 3d 498, 508 (D. Del. 2017) (highlighting "the financial burden of the discovery process in general, but particularly in antitrust cases"). Those costs counsel strongly in favor of application of the collateral order doctrine to allow interlocutory appeals of the denial of claims of state-action immunity in antitrust cases.

Applying the collateral order doctrine to accommodate this discrete class of rulings would be consistent with the requisite "stringent" application of the doctrine and would not pose any risk of "overpower[ing]" the interests of finality in litigation. *Will*, 546 U.S. at 350. Nor would this application of the collateral order doctrine burden the judiciary with "piecemeal, prejudgment appeals" that "undermine[] efficient judicial administration." *Mohawk Indus.*, 558 U.S. at 106 (internal quotation marks omitted). Neither concern is implicated in the context of state-action immunity. *Mohawk* dealt with routine,

privilege-related disclosure orders, which, like many discovery orders, arise repeatedly in the course of a single case. By contrast, the state-action immunity question is a discrete and conclusive question of law. Allowing an immediate appeal on this conclusive, single, and separate issue in the very limited context of state-action immunity in antitrust litigation against public entities will not invite piecemeal litigation or cut against finality interests. Rather interlocutory appeal of a denial of state-action immunity to a public entity will advance judicial efficiency and is the only way to adequately provide States and their subdivisions meaningful relief from the costs and burdens of unwarranted litigation.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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